Ms. Marlene H. Dortch Secretary Federal Communications Commission 445 12th Street, SW Washington, DC 20554

Re: Promoting and Protecting an Open Internet, GN Docket No. 14-28

Filed via ECFS

December 19, 2014

Dear Ms. Dortch:

On December 16, I met with Jon Sallet and Stephanie Weiner of the Office of General Counsel. I reminded them of the strong support across the startup and tech community for following the path set out in President Obama's comments in this proceeding. I made the following points:

Bright Line Rules

There is an overwhelming record, particularly filings by startup web companies, for bright line rules not ad hoc standards or presumptions.¹

¹ See Comments of Y Combinator, GN Docket No. 14-28, July 14, 2014, at 3, available at http://apps.fcc.gov/ecfs/document/view?id=7521383177 ("No startup has the funds and lawyers and economists to take on billion-dollar ISPs in an FCC action based on the vague legal standards in the proposal. Indeed, the startup ecosystem needs a bright-line, per se rule against discrimination."); Comments of Tumblr, GN Docket No. 14-28, Sept. 9, 2014, at 10, available at http://apps.fcc.gov/ecfs/comment/view?id=6018347452, ("Notably, Tumblr has only two lawyers, and no telecommunications lawyers or lobbyists on staff. Tumblr cannot afford to engage in what would likely be multi-year challenges against the biggest broadband providers, with large legal teams experienced in telecommunications law, simply to secure access for its users equal to that of its current, and future, competitors with deeper resources."); Comments of Reddit, GN Docket No. 14-28, July 15, 2014, at 8, available at http://apps.fcc.gov/ecfs/document/view?id=7521679127, ("We have no lawyers on staff, and we devote our resources solely to meeting the needs of our 100 million visitors. We do not have the resources to engage ISPs in a legal fight, with only a vague standard as our weapon, without any firm ground on which to stand. We need clear, bright-line rules.").; Comments of Meetup, GN Docket No. 14-28, July 14, 2014, at 8, available at http://apps.fcc.gov/ecfs/document/view?id=7521382127 ("It is simply unrealistic to think that a resource-constrained company such as Meetup would be able to avail itself of a vague and amorphous 'commercial reasonableness' standard that requires extensive and expensive adversarial proceedings."); Notice of Ex Parte from Gigi Sohn, Special Counsel for External

Affairs, Office of Chairman Tom Wheeler, GN Docket No. 14-28, July 16, 2014, available at http://apps.fcc.gov/ecfs/document/view?id=7521633973, (noting statements by an investor in favor of "bright line rules" and the argument that a "case-by-case approach, while appearing 'Solomonic,' favors those who can afford to litigate, namely deep-pocketed ISPs with armies of lawyers and lobbyists."); Comments of Vimeo, GN Docket No. 14-28, July 15, 2014, at 14-15, available at http://apps.fcc.gov/ecfs/document/view?id=7521394546.; Comments of Contextly, GN Docket Nos. 14-28 and 10-127, June 3, 2014, at i, available at http://apps.fcc.gov/ecfs/document/view?id=7521195149 (noting no lawyers on staff); Comments of VHX CEO Jamie Wilkinson, GN Docket No. 14-28, July 16, 2014, available at http://apps.fcc.gov/ecfs/document/view?id=7521586316, ("We do not have lawyers on staff, and we do not have the resources to negotiate individualized deals. If the rules around net neutrality are too soft, we would not be able to match our competitors experience, and we would not be able to survive."); Reply Comments of Distinc.tt, GN Docket No. 14-28, Aug. 5, 2014, at 8, available at http://apps.fcc.gov/ecfs/document/view?id=7521750451 ("We have no lawyers on our staff. We can't hire an outside legal team unless our case is airtight, and our chances of winning are high."); Reply Comments of Badger Maps, GN Docket No. 14-28, Aug. 5, 2014, at 4, available at http://apps.fcc.gov/ecfs/document/view?id=7521750452, ("While the Verizons and Comcasts of the world can afford thousand-dollar-an-hour lawyers, companies like Badger cannot. ... We need bright-line rules.") Reply Comments of RebelMouse, GN Docket No. 14-28, Aug. 5, 2014, at 4-5, available at http://apps.fcc.gov/ecfs/document/view?id=7521750463, ("We have no telecommunications lawyers on staff (we have one lawyer period), and we have virtually no budget for legal actions. Anything less than a bright line rule would not help us because we just don't have the resources to battle over presumptions."); Reply Comments of Shapeways, GN Docket No. 14-28, Aug. 5, 2014, at 7, available at http://apps.fcc.gov/ecfs/document/view?id=7521750466, "We cannot afford to sue the biggest ISPs simply to access our users with service equal to our competitors. Anything less than a bright-line rule would harm us because we just don't have the resources to battle over presumptions."); Reply Comments of MobileWorks, GN Docket No. 14-28, Aug. 5, 2014, at 6, available at http://apps.fcc.gov/ecfs/document/view?id=7521750457, ("But we have no attorneys on staff and a modest legal budget. ... Nor do we have the resources to work with an Ombudsman or bring litigation when we face 'commercially unreasonable' offers."); Reply Comments of Publitas, GN Docket No. 14-28, Aug. 5, 2014, at 4, available at http://apps.fcc.gov/ecfs/document/view?id=7521750462, ("We have no telecommunications lawyers on staff; big ISPs have hundreds at their disposal. We simply don't have the resources to fight a legal battle on the basis of presumptions."); Reply Comments of PadMapper, GN Docket No. 14-28, Aug. 12, 2014, at 4, available at http://apps.fcc.gov/ecfs/comment/view?id=6018260134, ("We don't even have a full-time general counsel. ... We couldn't afford to fight back against one ISP that tried this, let alone every ISP that would likely try this. ... The only way to protect small companies like us is to enact bright-line rules against abuses."); Reply Coments of Sidecar Technologies, GN Docket No. 14-28, Aug. 12, 2014, at 4-5, available at http://apps.fcc.gov/ecfs/document/view?id=7521760441, (We are also well aware that major ISPs like the large telephone and cable companies can fund an army of FCC and telecommunications lawyers, while we stretch our single lawyer and slim

Title II promotes competition and investment in broadband networks

The key drivers of investment are demand and competition, particularly from new entrants.² Title II promotes competitive entry in at least two ways. First, Section 224 ensures that telecommunications carriers receive access to the poles of local exchange carriers and

legal budget across our many legal needs. We need the protection of bright-line rules."); Reply Comments of TerrAvion, GN Docket No. 14-28, Sept. 3, 2014, at 4, available at http://apps.fcc.gov/ecfs/document/view?id=7521827328, ("We don't have an army of telecommunications lawyers, like big ISPs. In fact, we have not a single lawyer on our staff, and a tiny legal budget. If we were going to sue an ISP, we would need to have a rock-solid case. But we can't build a case like that on an extremely vague standard of 'commercial reasonableness.' Instead, we need bright-line rules against blocking, technical discrimination, and paid prioritization."); Comments of Imgur, GN Docket No. 14-28, Aug. 12, 2014, at 7, available at http://apps.fcc.gov/ecfs/document/view?id=7521758180, ("[W]e cannot afford to enter into the protracted legal battles necessary to receive clear guidance on the scope of the regulations. In practical terms, the proposed rules leave Imgur without options in challenging even outright violations. Our preference is for clarity: Imgur can only operate with confidence in the presence of a bright-line rule."); Coments of Kickstarter, GN Docket Nos. 14-28 and 10-127, July 10, 2014, at 3, available at https://d3mlfyygrfdi2i.cloudfront.net/KickstarterCommenttoFCC.pdf, ("We would have no real recourse if we were offered an unfair price. Using our small legal team or hiring outside counsel to prove that an offered deal was 'commercially unreasonable,' as proposed in your rules, would take far too long and cost far too much to be a feasible option. Even working with the ombudsperson you propose would be too onerous."); Comments of Etsy, GN Docket Nos. 14-28 and 10-127, July 8, 2014, at 7-8, available at https://blog.etsy.com/news/files/2014/07/Etsy-Open-Internet-Comments-7.8.14.pdf, ("The factors the Commission proposes to prove commercial reasonableness are far too vague, and would provide little certainty as to whether bringing a case would be worthwhile. Meanwhile, if we chose to proceed, we would be up against the broadband providers' expert lawyers and unfathomably deep pockets. I can say with confidence that ... there is almost no chance we would risk the capital and time required to bring a successful complaint before the FCC."). Some larger companies, trade associations, and nonprofits agree. See Notice of Ex Parte of COMPTEL, GN Docket No. 14-28, Nov. 12, 2014, at 2, available at http://apps.fcc.gov/ecfs/document/view?id=60000982192, ("Mr. Huseman [of Amazon] asserted that the Commission should create clear, bright line rules."); Reply Comments of the Internet Association, GN Docket Nos. 14-28 and 10-127, Sept. 10, 2014, at 11, available at http://apps.fcc.gov/ecfs/document/view?id=7521868266, (calling for "a readily enforceable, bright-line rule that ensures consumers are adequately protected."); Notice of Ex Parte of Free Press, GN Docket No. 14-28 and 10-127, Dec. 4, 2014, at 1, available at http://apps.fcc.gov/ecfs/document/view?id=60000989717. The Obama Plan and letters from members of Congress, including Senator Angus King, also call for bright line rules. ² Comments of Free Press, GN Docket Nos. 14-28, 10-127 and 09-191, July 17, 2014, passim, available at http://www.freepress.net/sites/default/files/resources/Free Press 14-28 Comments 7-18-2014.pdf.

utilities at just, reasonable, and nondiscriminatory rates. This important investment benefit will enable those deploying fiber-to-the-home or other competitive networks to deploy more expeditiously and efficiently. Second, Title II offers other benefits at the state level, including access to public rights of way, which companies like Verizon take advantage of to deploy networks.³ Third, Title II is necessary for open Internet rules, as the *Verizon* court recognized.⁴ The Federal Communications Commission (FCC or Commission) has already correctly determined that a nondiscriminatory Internet access fosters a virtuous cycle of investment in apps and networks, while discrimination and fees would incentivize carriers to neglect the baseline service. The DC Circuit found that the FCC had "substantial evidence" and upheld the FCC on this point.⁵

Forbearance

If the FCC reclassifies broadband Internet access service, it should forbear from most provisions of Title II.

There are essentially three categories: provisions that the FCC must retain, those that require further study on whether to retain them, and those that warrant immediate forbearance. The FCC will face these categories anytime it decides that a certain service is a Title II service, so these are somewhat novel issues, but the FCC will likely come across them again, as envisioned in the Communications Act.

<u>Retain:</u> The FCC must retain at least Sections 201, 202, and 208, the basic provisions that apply to enterprise broadband, and provisions necessary to enforce strong rules against application-specific discrimination and access fees. A voluminous record and Commission precedent demonstrate the need for these three bedrock provisions to ensure an open Internet.

<u>Consider</u>: The FCC should decline to forbear from other important sections in the immediate term and can determine later whether to forbear or, more likely, how to implement them. These include extremely important consumer protections such as Sections 222, 254, and 255, which relate to the protection of end users' privacy, promotion of universal service, and accessibility by disabled consumers. These provisions, while important, are beyond the scope of the current record and not necessary to determining the questions in this proceeding. Few would disagree that the FCC should protect these important goals in the Internet age. Indeed,

_

³ Jon Brodkin, "Report: Verizon FiOS claimed public utility status to get government perks," ARS TECHNICA, May 28, 2014, http://arstechnica.com/tech-policy/2014/05/report-verizon-fios-gets-perks-from-government-while-avoiding-regulations/.

⁴ New Neutrality's Legal Binary: An Either/Or With No "Third Way", http://ammori.org/2014/05/13/net-neutralitys-legal-binary-an-eitheror-with-no-third-way/ (May 13, 2014).

⁵ See Verizon v. FCC, 740 F.3d 623, 644-47 (D.C. Circ. Jan. 14, 2014).

the FCC has recently acted on consumer privacy matters⁶ and is still in the midst of a multi-year effort to structure the universal service fund to encourage broadband deployment.⁷ These are ongoing issues, not new ones, and the FCC cannot and need not resolve them in two months. Nor should these issues delay the overdue open Internet rules.

Moreover, these provisions are not operative or largely already apply. First, the provisions of Section 254 are not immediately operative on carriers. Section 254 imposes obligations on the FCC to adopt rules, and the obligations imposed on telecommunications carriers to "contribute" shall do so based on "mechanisms established by the Commission." So the statute expects the Commission to establish those mechanisms first. Also, because broadband Internet access service (BIAS) is an interstate service, the state obligations in 254(f) shall not apply.

Additionally, although Section 222 applies to carriers, those carriers have previously been subject to FTC privacy authority and obligations for non-common carrier services. Further, while Section 255 applies to carriers, advanced services and mobile phones were already subject to a range of obligations under Sections 716, 717, and 718 of the Act.⁸

In addition, the FCC can simply adopt Notices of Proposed Rule Makings on these matters and stay complaints until the end of the rulemaking. Agencies have the authority to stay complaints while pursuing a rulemaking, and to decide to make policy through the rulemaking process rather than by addressing initial complaints.

^{65 51 51 10}

⁶ Press Release, Federal Communications Commission, Verizon To Pay \$7.4M To Settle Consumer Privacy Investigation (Sept. 3, 2014), available at http://www.fcc.gov/document/verizon-pay-74m-settle-privacy-investigation-0; Press Release, Federal Communications Commission, FCC Plans \$10M Fine For Carriers That Breached Consumer Privacy (Oct. 24, 2014), available at http://www.fcc.gov/document/fcc-plans-10m-fine-carriers-breached-consumer-privacy.

⁷ Federal Communications Commission, Universal Service, http://www.fcc.gov/encyclopedia/universal-service (last accessed Dec. 19, 2014)("The FCC is reforming, streamlining, and modernizing all of its universal service programs to drive further investment in and access to 21st century broadband and voice services. These efforts are focused on targeting support for broadband expansion and adoption as well as improving efficiency and eliminating waste in the programs.").

⁸ 47 U.S.C. §§ 617, 618, 619.

⁹ Lumen N. Mulligan & Glen Staszewski, *The Supreme Court's Regulation of Civil Procedure: Lessons from Administrative Law*, 59 UCLA L. Rev. 1188, 1236, n. 288 (2012)(citing 10 C.F.R. §2.802(d) (2012) (stating that a petitioner who has filed a petition for rulemaking "may request the Commission to suspend all or any part of any licensing proceeding to which the petitioner is a party pending disposition of the petition for rulemaking"); Massachusetts v. United States, 522 F.3d 115, 125 (1st Cir. 2008) (applying 10 C.F.R. §2.802(d)); Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs, 260 F.3d 1365, 1380-81 (Fed. Cir. 2001) (directing Veterans Affairs to complete an expedited rulemaking within 120 days, unless extended by the

Certainly, the FCC should not determine that, because (for example) universal service reform may take several years, BIAS should thus remain an information service despite meeting the statutory definition of a telecommunications service, despite the clear need for immediate, strong open Internet rules to protect innovation, free expression, and competition.

Finally, these provisions all apply to enterprise broadband, a framework that AT&T has praised. For example, Sections 201, 202, and 208 apply to AT&T's enterprise broadband service. In addition, AT&T did not even seek forbearance "from Title II provisions that serve public policy goals, such as privacy and disability access" and even "disavow[ed] any intent to seek relief from universal service contribution obligations." Therefore 222, 254, and 255 continue to apply. AT&T has recently called this framework an "unqualified regulatory success story," and claimed that these services "represent the epicenter of the broadband investment that the Commission's national broadband polices seek to promote." 12

<u>Forbear</u>: The FCC can likely forbear from all other provisions. The FCC's 1994 Commercial Mobile Radio Services (CMRS) order is a good model for forbearing from many provisions at once and deferring forbearance while not invoking the authority. The order is also based on Section 332, whose standard largely mirrors Section 10's standards.¹³

Forbearance from tariffing provisions

The FCC can forbear from the tariffing provisions of Section 203. There have been several flawed arguments asserting that the FCC cannot, claiming: the FCC can only forbear from tariffing in a competitive market but the FCC will have to determine that a market is not competitive in order to impose open Internet rules. So the FCC cannot both adopt open Internet rules and de-tariff.

court, and to stay all adjudications under the rule until its validity was established); In re Tenn. Valley Auth. (Bellefonte Nuclear Power Plant, Units 3 & 4), 68 N.R.C. 361, 383 (2008) (recognizing that the Nuclear Regulatory Commission had the discretion to stay an adjudication until the parties could complete a rulemaking but declining to exercise that discretion).

¹⁰ See Securities and Exchange Commission v. Chenery Corporation, 332 U.S. 194 (1947).

¹¹ Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services; Petition of BellSouth Corporation for Forbearance Under Section 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services, WC Docket No. 06-125, Memorandum Opinion and Order, 22 FCC Rcd 18705, ¶ 67, 74 & n.238 (2007).

¹² Comments of AT&T, WC Docket No. 05-25, RM-10593, Apr. 16, 2013, at 3, available at http://apps.fcc.gov/ecfs/document/view;jsessionid=vkprRvfXhrlvY53Yd53FSrwBgXDdQl1RQDQ NL8KyvJ1mnltvnTG4!638063854!-817071755?id=7022283535.

¹³ Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411, 1478 (1994).

This argument is flawed on many levels. Logically, the FCC can determine that a particular market needs nondiscrimination rules but not tariffing; one example is the enterprise broadband order discussed above. The FCC also recognized this concept for tariffing itself regarding CMRS: "although the record does not support a finding that the cellular services marketplace is fully competitive, the record does establish that there is sufficient competition in this marketplace to justify forbearance from tariffing requirements." 14

Moreover, the FCC can determine that open Internet rules are required because of a terminating monopoly that affects applications. On that side of the market—where there is a market failure—the FCC does not need any tariffs because it should ban access fees and application-specific discrimination. If there is no access fee, then the carriers need not post a "tariff" of zero, just as the carriers have never advertised the price of zero (and the price of zero has been the historical practice). On the other side of the market, there is very little competition, but often limited competition between the phone carrier and cable carrier for fixed BIAS service, and among four carriers for complementary mobile BIAS service. In both circumstances, there is limited competition. Tariffing in limited-competition markets often leads to higher prices through signaling that facilitates coordinated price increases and enables the few competitors to police any "cheating" from such coordination. 15 Tariffing in such markets would likely harm consumers. As a result, tariffing clearly meets the test in Section 10.¹⁶ It is not needed to ensure nondiscrimination or reasonable practices as the open Internet rules and complaints (regarding edge providers) and limited competition (regarding consumers) should cover it. Nor is it needed to protect consumers (tariffs for consumer service would harm them; regarding edge providers, tariffs listing the ongoing "price" of 0 would simply be an additional cost with no benefit if access fees are banned). Such forbearance is also consistent with the public interest in promoting innovation without needless burdens or facilitating signaling and higher prices. While promoting "competition" is sufficient to meet one prong of the three-prong analysis for forbearance (the public interest prong), it is not necessary. The FCC can decide there are other reasons why forbearance furthers the public interest.

Specialized services

Other than carrier-IPTV and carrier-VOIP, specialized services have generally referred to hypothetical cases in the future. As a result, the FCC in 2010 emphasized the need to closely

1

¹⁴ Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411, 1478 (1994).

¹⁵ Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411, 1479 (1994) ("tariffs may simplify tacit collusion").

¹⁶ 47 U.S.C. § 160.

"monitor" such services to make sure that they not used merely as an exception that swallows the open Internet rule. 17

Both the president and FCC have defined specialized services to comprise a very narrow category of non-Internet services. President Obama's example limited the category to nonresidential networks: "specialized services such as dedicated, mission-critical networks serving a hospital." ¹⁸ The Commission's 2010 order referenced merely carrier-VOIP, ¹⁹ carrier-IPTV, ²⁰ and "connectivity bundled with e-readers, heart monitors, or energy consumption sensors, to the extent the service relates to the functionality of the device." ²¹ Anything "providing a functional equivalent" of BIAS is not a specialized service. 22

The FCC should continue to monitor and be ready to act, particularly to ensure competitive non-carrier-provided video services. In 2010, this Commission said it "will closely monitor specialized services and their effects on broadband service to ensure, through all available mechanisms, that they supplement but do not supplant the open Internet." It would also "closely monitor the robustness and affordability of broadband Internet access services, with a particular focus on any signs that specialized services are in any way retarding the growth of or constricting capacity available for broadband Internet access service. . . . [and] would be concerned if capacity for broadband Internet access service did not keep pace."²³ In addition, the FCC promised to "monitor the potential for anticompetitive or otherwise harmful effects from specialized services, including from any arrangements a broadband provider may seek to enter into with third parties to offer such services."²⁴ It also would ensure that specialized services would not be offered as a substitute for BIAS, as such services would skirt the open Internet rules and harm it.

The FCC should have a complaint process for addressing such issues and should retain the power to act on its own motion. The procedures can mirror those used for the open Internet rules. The FCC should also require carriers to prove that a specialized service cannot be offered over the open Internet, in addition to not retarding the growth of capacity, not harming competition, and not otherwise harming the open Internet. Moreover, carriers should be required to offer these services to third-parties on reasonable terms and without unreasonable discrimination.

8

¹⁷ See Preserving the Open Internet, Broadband Industry Practices, GN Docket No. 09-191, WC Docket No. 07-52, Report and Order, 25 FCC Rcd 17905, 17965-66 ¶¶ 112-114 (2010) (2010 Order).

¹⁸ President Barack Obama, Statement on Net Neutrality (Nov. 10, 2014), available at http://www.whitehouse.gov/net-neutrality#section-read-the-presidents-statement.

¹⁹ 2010 Order, 17928 ¶ 39.

²⁰ *Id.*, 17965 ¶ 112. ²¹ *Id.*, 17933 ¶ 47.

²² *Id.*, 17965-66 ¶ 113.

²³ *Id.*, 17966 ¶ 114.

²⁴ *Id.*

Specialized services offered to third-parties should be subject to Title II. While these services are still hypothetical, they appear to be offerings to transmit the data of the user's choosing, merely with some particular necessary quality-of-service guarantee. This service is therefore clearly a telecommunications service, whether used for third-party IPTV, VOIP, or another service. The FCC should retain Sections 201, 202, and 208 to address unreasonable discrimination or unreasonable practices.

Sincerely,

Marvin Ammori